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A Year in Kenya: Professors Makau and Athena Mutua Help Build A New and Better State

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Supporters of Presidential candidate Mwai Kibaki during the campaign leading to his election last December.

A year in Kenya

*Professors Makau
and Athena Mutua
help build a new
and better state*



Professor Makau Mutua



Associate Professor
Athena D. Mutua

A yearlong sabbatical provided anything but peace and quiet for husband-and-wife UB Law School professors Makau and Athena Mutua.

They spent the year in Kenya, Makau Mutua's country of birth, in a time of fundamental political change as the electorate deposed longtime President Daniel arap Moi, and worked on two major national projects: the drafting of a new constitution and the establishment of a truth, justice, and reconciliation commission for the African nation.

"I was humbled by the trust and the confidence that Kenyans and senior members of the government showed in me by giving me all these responsibilities," Mutua said. "At the end of the day, I felt like I was a child of two worlds – America and Kenya."

The adventure began in August 2002, when the Mutuas – three young boys (Lumumba, Amani and Mwalimu) in tow – took up residence in Nairobi. The children attended Braeburn, an international school in the cosmopolitan city, while their parents worked on projects associated with the Kenya Human Rights Commission, the country's leading human rights organization, which Makau Mutua chairs.

They arrived at a crucial time in the nation's history. The political opposition to Moi's government, which had a record of human rights abuses including political assassinations and looting of the public treasury, was on the verge of unity. At one time, Mutua said, it was estimated that only 30 percent of taxes collected went for the public good; corrupt public officials pocketed the rest. "It is a miracle the country even stayed afloat," he says.

Hence the human rights group's interest in the presidential election scheduled for Dec. 27 last year. Though it had been standard practice for non-governmental organizations like his to take a hands-off approach to politics, Mutua said, it became apparent that it was necessary for the Kenya Human Rights Commission to become active in the political campaign. "Human rights groups are not supposed to be partisan," Mutua says. "But where there is a clear choice between a state that violates human rights and the possibility of a better tomorrow, I think one has to



Left to right: Minister for Justice and Constitutional Affairs Hon. Kiraitu Murungi, Archbishop Desmond Tutu and Professor Makau Mutua, in Nairobi.

be partisan. You cannot be a fence-sitter."

This became especially true when the three major opposition figures and their parties – which had never before been able to cooperate in their efforts to win power – agreed in September 2002 to jointly field a single candidate, Mwai Kibaki, against the ruling KANU party. Eleven other, smaller opposition parties joined the effort.

The opposition coalition, which was joined by a splinter group from the KANU party, eventually became known as the National Rainbow Coalition, or NARC.

"It was clear that Kenyans wanted fundamental political change," Mutua says. "Moi had been in power for 24 years, and the country had been ruined economically. The infrastructure had collapsed; hospitals lacked medicines and proper facilities, such as surgical equipment and anesthesia; joblessness was at an all-time high. Insecurity had risen to very high levels. The country had become inhospitable."

Against that background, the opposition candidate's success seemed as-

sured – and that proved true. Kibaki, 72 – who then had a bad auto accident, and who subsequently had a relapse but is now fully recovered – won the presidency with a vote of 3.8 million to 1.8 million. The inauguration ceremony in Nairobi, the Mutuas say, was a joyous celebration by what looked like millions of Kenyans.

Concurrently with the election campaign, the couple was working on a new constitution for Kenya. The nation's original constitution, drafted with help from former U.S. Supreme Court Justice Thurgood Marshall, had been amended 35 times by both Kenyatta (Kenya's first president) and Moi through their rubber-stamp parliaments, and concentrated all power in the executive branch. Those who spoke against the government oppression were detained without trial, assassinated, or exiled. Mutua was forced to leave his country after he and fellow law students spoke out against the Moi government's repressive actions.

But in a world climate of the col-

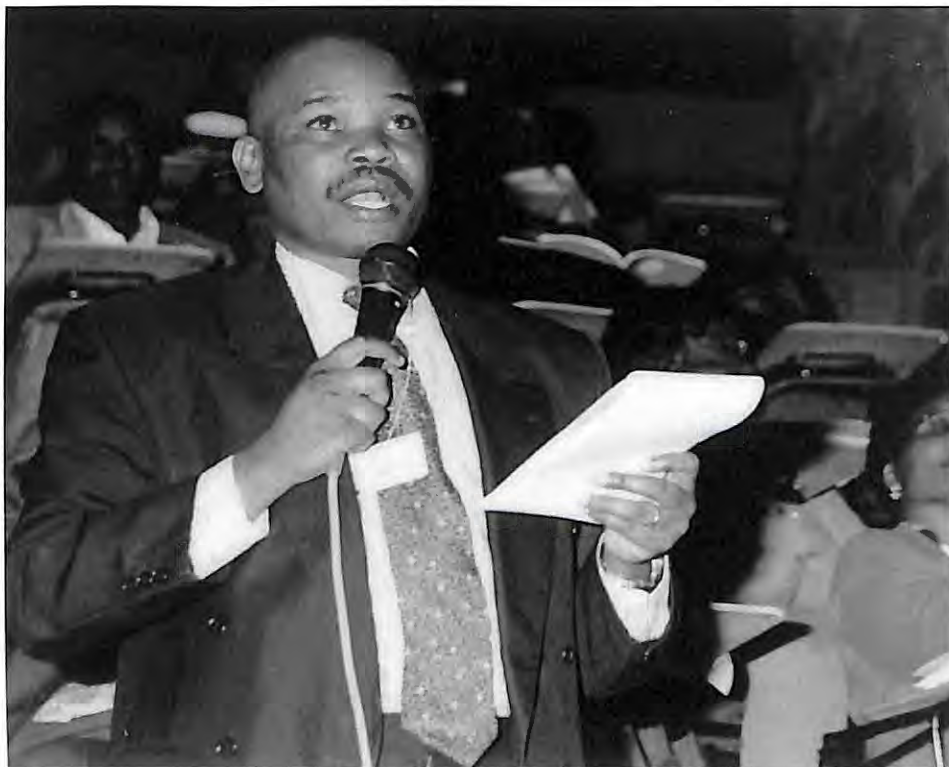
Faculty

lapse of one-party governments, pressure from churches and human rights groups led to a push to write a new constitution for Kenya. In 1995, the Kenya Human Rights Commission and other civic groups produced a model constitution, and in the late 1990s Moi set up a constitutional review commission headed by distinguished law professor Yash Ghai, a Kenyan on the law faculty of the University of Hong Kong.

Two years ago, despite suspicions that the process was fatally tainted by KANU's involvement, interviews were conducted with Kenyans nationwide about what they wanted in a new constitution, and a 630-delegate National Constitutional Conference constituted. In late September 2002, Ghai released a draft constitution, but the conference was adjourned until after the election. It reconvened in April this year under the new government leadership – but the process proved chaotic, with many competing interests and no clear mandate to work through the issues involved and deal with the intricacies of the constitutional language.

Mutua was named a delegate to the conference – Delegate No. 584. He proved to be an unpopular one, because he recommended turning the constitution-writing job over to a panel of experts rather than trying to get the job done by the delegates to the conference. He says that a large chunk of the delegates were Moi and KANU supporters, and were drawn from social classes that were unsympathetic to reforms. He adds that they were not competent to draft a constitution. For one thing, the delegates were being handsomely paid for their work, and many regarded the convention as an expenses-paid holiday in Nairobi. They were in no hurry to go home and let the lawyers do the job.

The Kibaki government, too, has an interest in delaying the process, be-



Professor Makau Mutua, a delegate to the National Constitutional Conference, addresses the plenary in May 2003.

cause the delegates are leaning toward creating the position of prime minister, which would rival the presidency in power. At press time, the government was alleged to be attempting to delay the conference's progress in its second session until its scheduled end on Sept. 30 – with the goal of then turning the writing of the constitution over to a legal panel.

It was during the debates over the new constitution that Athena Mutua did her unique work in Kenya. An advocate for social justice, she worked with a coalition of groups – the Kenya Human Rights Commission, the Kenyan Federation of Women Lawyers (FIDA), the Institute for Education in Democracy, and the League of Kenyan Women Voters – in a push to safeguard and strengthen the gains for women that were included in the draft constitution.

For example, Mutua said, she and her colleagues made 30 proposals for

alternative language, which she drafted, that included suggestions such as changing “individuals” to “men and women” in order to make women more visible in the constitution and to make clear the government's obligation to ensure women's rights. “Constitutions are ultimately legal documents,” Athena Mutua says. “They are ultimately about language, period.”

She and her colleagues trained delegates from seven of the country's eight provinces, sensitizing them to issues of women's rights and gender-inclusive language. They produced a number of documents on the group's positions that were made available to delegates to the constitutional conference. And the coalition sponsored a twice-weekly newspaper – the only one on the grounds of the conference – that became the newspaper of record for the drafting process and has come to be seen as “the delegates' paper” as against the national press coverage.

The coalition was a strong advocate

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for a proposal that one-third of the members of the 300-person parliament under the new constitution be women – even going so far as to recommend that all 90 seats reserved for members elected through proportional representation be filled by women. Currently, just over a dozen women serve in Kenya’s parliament.

Another issue for the coalition was the provision of Muslim courts in the constitution, Mutua says. In a country that is about 70 percent Christian and about 25 percent Muslim, acting in solidarity with Muslim women is crucial. She says: “The coalition’s support for maintaining Kadhi (Muslim) courts, which have existed in Kenya for hundreds of years and apply Islamic personal law, demonstrated our commitment to social justice for everyone and true freedom of religious practice, even we pushed for stronger provisions on equality.”

“I think it was impressive that Athena, who is not Kenyan and had not lived in Kenya, eventually ended up being very deeply involved in the constitutional review process,” Makau Mutua says. “Kenyans are very suspicious of foreigners, but she won the people over for several reasons: She was humble, she did not come across as a loud American, and she was able to do a lot of work. They actually in the end regarded her as a sister.”

Finally, in April 2002, the government heeded the calls of Makau Mutua and the Kenya Human Rights Commission for the establishment of a truth commission. The government appointed Mutua the chairman of an 18-member task force to advise the government if Kenya needs a truth commission, and, if so, to make recommendations on the type of commission that should be established. An institution



Kerry Kennedy Cuomo and Professor Makau Mutua in Nairobi during the international conference on a Truth Commission for Kenya.

similar to South Africa’s Truth and Reconciliation Commission, the Kenyan one would investigate past abuses of power by the government and prosecute wrongdoing. It would seek the truth, provide justice, and create an environment for national healing. Makau Mutua organized three conferences on the idea – two national conferences in March and July, and an international conference in August that featured Archbishop Desmond Tutu and Professor Ali Mazrui, the world-famous academic from Binghamton University, as the inaugural and keynote speakers, respectively. Professor Henry Steiner of Harvard Law School was among the other prominent speakers.

The work of Mutua as chairman of the task force was grueling but uplifting. Working with 18 prominent Kenyans was rewarding. Among other activities, the task force held public hearings in all eight provinces – hear-

ings that sometimes drew as many as 1,000 people. “It was clear to me that the country is hurting deeply, there are many unresolved issues, there is much pain and anger, and a truth commission is necessary,” Mutua says. Facing a short deadline (he had to complete his report by Aug. 31), he drafted a 162-page report to be presented to the minister for justice and the president in October. It is possible, he says, that he may be asked to head the truth commission if one is established.

The work continues in Kenya, even as both professors return to the rather more mundane duties of teaching American law students and monitor the situation from afar. Makau Mutua, who is now a columnist with the *Sunday Nation*, east Africa’s largest-circulation paper, will keep his pulse on the country by writing every Sunday. And with international interest in Kenya as a key economic and political player in Africa, the transition in the nation, as well as the projects that the two UB Law professors worked on, will command attention for a long time to come.